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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 385

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—v.—

CLINCHFIELD RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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August, 1969

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JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1969. A timely petition for rehearing was denied on March 26, 1969. On June 19, 1969, Mr. Justice Stewart extended the time within which a petition for certiorari might be filed to and including July 24, 1969, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an arbitration award rendered under the Railway Labor Act by reason of an agreement to arbitrate may be impeached under the circumstances of this case, where the agreement to arbitrate did not contain all the recitals as to procedural matters set forth in Section 8 of the Act, but where the agreement specified that the arbitration be conducted under the Railway Labor Act, and the Act's procedures were either substantially complied with or noncompliance was waived or actively initiated by the party seeking to impeach the award.

STATEMENT

The dispute.—In April, 1965, the respondent, Clinchfield Railroad Company ("Clinchfield"), determined that henceforth the cabooses operated on its line would be run on a pooled basis. (Beals Aff. Ex. 1, p. 3)[1] Clinchfield announced its proposal to the affected brotherhoods, the Order of Railway Conductors and Brakemen ("Conductors") and the Brotherhood of Railroad Trainmen ("Trainmen"), and initially took the position that inasmuch as it viewed itself as already "having the right of pooling cabooses" it did not have to comply with the procedures of the National Pooling of Cabooses Agreements with the Conductors and the Trainmen. See Article 7(b) of the Agreements, Pet. 10; Beals Aff. Ex. 1, pp. 3-5. After discussions with the representatives of the Conductors and

[1] We thus refer to the affidavit of L. R. Beals and its Exhibit 1, which was filed by Clinchfield in the District Court in support of Clinchfield's motion to dismiss the complaint for impeachment of the award. The transcript of the proceedings before the Arbitration Board will be referred to as "Arb. Tr."

the Trainmen, at their insistence, Clinchfield in May, 1965, initiated the procedures for pooling of cabooses contemplated by the National Pooling of Cabooses Agreements.[2] See Pet. 10-11; Beals Aff. Ex. 1, pp. 5-6; Arb. Tr. 28.

The Conductors and the Trainmen responded by proposing an extensive list of conditions to be imposed upon the pooling of cabooses, some of which touched on the subject of "providing accommodations substantially equivalent to those formerly available on the cabooses and used by the employees" and the subject of "arrangements for supplying and servicing such pooled cabooses," as contemplated by the National Agreements, and others of which did not. See National Agreements, Article 7(c)(1), Pet. 11; Beals Aff. Ex. 1, pp. 7-8. At various times through July 1965, the parties conferred on the accommodations and arrangements to be furnished, but did not reach agreement; Clinchfield then requested the services of the Na-

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[2] We so refer to Article 7 of the National Agreement dated May 25, 1951, between various railroads and the Trainmen and Article 7 of the National Agreement dated May 23, 1952, between various railroads and the Conductors. The text of these articles are identical except as to the effective dates set forth in Article 7(d), and except that in the version adopted with the Conductors, at the conclusion of Article 7(c)(3), as set forth at Pet. 11, the following words are added: "except that the award shall not require the carrier to pool cabooses but shall be accepted by the parties as the conditions which shall be met by the carrier if and when cabooses are pooled. Provided further, however, if carrier elects not to put the award into effect, carrier shall be deemed to have waived any right to renew the same request for a period of one year following the date of said award, except by consent of employees party to said arbitration." With these exceptions, the texts of Article 7 are as set forth at Pet. 10-11.

The two National Agreements deal with a number of separate subjects in various articles, the subject of pooling of cabooses being but one subject among many. See n. 7, p. 14, *infra*. When we refer herein to the "National Pooling of Cabooses Agreements," we refer specifically to Article 7 of these National Agreements. References to the "National Agreements" in general terms will include references not only to Article 7 but to other articles.

tional Mediation Board, as provided in Article 7(c)(2) of the National Agreements. See Beals Aff. Ex. 1, pp. 10-13. A mediator was assigned and met with the parties in September, 1965, but the parties were unable to reach agreement as to the accommodations and arrangements to be furnished the men previously using the assigned cabooses. (Beals Aff. Ex. 1, pp. 13-15)

The National Agreements which had been signed by the Conductors and the Trainmen, respectively, and the various carriers, expressly provided in Article 7(c)(3) that: "If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the arbitration board shall be final and binding upon both parties." Clinchfield, accordingly, then wrote the National Mediation Board suggesting that the arbitration procedure contemplated by Article 7(c)(3) of the National Agreements be commenced. The Mediation Board agreed, and in October, 1965, Clinchfield designated its arbitrator for the board. (*Id.*, at 15) In November, 1965, the Conductors and the Trainmen each named an arbitrator, and in December, 1965, the parties' arbitrators met and conferred upon the selection of a neutral arbitrator.[3] They were unable to agree on a neutral, and accordingly in response to a request by Clinchfield, the National Mediation Board early in 1966 set up an arbitration board comprised of the arbi-

[3] The Railway Labor Act provides that where the parties do not agree to an arbitration board of six persons, arbitration is to be conducted by a board of three persons. Section 7 *First*. In the case of a board of three, one is a representative of the carrier, another is a representative of the employees, and the third is chosen by the first two, or failing such choice, by the Mediation Board. Section 7 *Second* (a). Since the two brotherhoods each insisted on naming its own arbitrator, Clinchfield named a second arbitrator to represent it, so as to preserve the status of the neutral arbitrator as a tie-breaker.

trators named by the parties and a neutral named by the Board. See Sections 7 *Second* and *Third* (a) of the Railway Labor Act (the "Act").

The arbitration proceedings.—In the late stages of the discussions immediately before the submission to arbitration, the brotherhoods had cited the recital of Article 7(a) of the National Agreements which expressed the sentiments of the carriers and brotherhoods that they were "desirous of cooperating in situations where train service can be improved and trains expedited by the pooling of cabooses." (Pet. 10) The brotherhoods somewhat belatedly took the position that this required that a demonstration be made by the carrier that train service could be improved and trains expedited by the proposed pooling before the carrier had the right to pool cabooses. Beals Aff. Ex. 1, pp. 16-17; Pet. A14-A18. The brotherhoods also contended that no such showing had been made by Clinchfield. At first, the brotherhoods took the position that this issue should be determined by the arbitrator (Beals Aff. Ex. 1, pp. 16-17), but later the Presidents of the two brotherhoods in letters to the National Mediation Board expressed the view that this issue was not even arbitrable. Pet. A14-A18. When the arbitration board convened, the brotherhoods renewed their contention that until the issue of the carrier's right to invoke Section 7 of the National Agreements had been resolved, the board was without power to proceed. A letter to this effect to the neutral arbitrator was put into the record of the proceedings. Arb. Tr. 12.[4] No other specific objection to the con-

[4] The letter was filed in the District Court as part of the proceedings before the arbitration board. See Pet. A26. It is substantially similar to the "Statement of Labor Party Members" later submitted to the board which is attached as Appendix B hereto.

stitution of the board or its procedures was made, except that the brotherhood representatives made the related objection that the issues to be decided by the arbitration board had not been properly defined. See Arb. Tr. 17, 58-59, 67, 79.

The arbitration board met in April, 1966, to review the preliminary question as to the powers of the carrier to invoke the procedures under Section 7 of the National Agreements and its own jurisdiction to proceed further in the light of the brotherhoods' assertions. After this session, the neutral member of the board in May, 1966, rejected the contentions of the brotherhoods as to these matters. Pet. A21-A22; Arb. Tr. 149-149A, 170.

The board then convened again in January, 1967, to consider the ultimate substantive question as to what accommodations would be "substantially equivalent to those formerly available on the cabooses" and what arrangements would be appropriate "for supplying and servicing such pooled cabooses." The brotherhood representatives reiterated their objections previously made to the jurisdiction of the board, to the effect that the carrier had not demonstrated what they claimed to be the preconditions to its rights to pool cabooses; they participated in further proceedings before the board subject to those objections; however, no other objection to the composition of the board or to the board's procedures was made. Pet. A22; Arb. Tr. 150, 161-67.[5]

The board then reviewed in detail the proposals for alternative facilities, such as kitchen facilities, refrigera-

[5] The brotherhood representatives at this time presented to the neutral arbitrator a written statement of their position, which was also read into the record. Arb. Tr. 162-66. It is attached as Appendix B hereto.

tors, stoves and lockers, as advanced by the brotherhoods and by Clinchfield. Arb. Tr. 181-82, 193-98, 203-04, 215-16, 221-34, 253-82, 293-98. The neutral member found that various facilities, more extensive than those proposed by Clinchfield but less extensive than those requested by the brotherhoods, should be provided. Pet. A24. The Clinchfield representatives concurred in an award to this effect and the brotherhood representatives declined to execute it. Pet. A25. The neutral member and the carrier members then executed the certification of the award as specified in Section 8(k) of the Act, and the same was filed on May 3, 1967, in the Clerk's Office of the United States District Court for the Eastern District of Tennessee, the district where the controversy arose and the arbitration was entered into. Pet. A26-A27.

The judicial review proceedings.—On May 12, 1967, the petitioners filed a complaint with the District Court to impeach the award. The complaint alleged in general terms the grounds specified in Section 9 *Third* (a) and (b) of the Act for impeaching arbitration awards, primarily focusing on the absence of specific recitals in the arbitration agreement as to the various procedural matters listed in Section 8 of the Act. The District Court granted a motion for summary judgment filed by the petitioners, on the grounds that the fact that the arbitration board consisted of five members violated the terms of the agreement to arbitrate. (Pet. A6)

On appeal, the Court of Appeals for the Sixth Circuit unanimously reversed the judgment of the District Court. It held that the brotherhoods had waived any point which they had concerning the fact that the board consisted of five members, rather than the three or the six contemplated by the Act, inasmuch as the brotherhoods had never objected to this point before the arbitration board.

(Pet. A12-A13). The court also considered the contention, now emphasized by the Petition for Certiorari, that the agreement to arbitrate contained in the National Agreements did not contain all the recitals listed in Section 8 of the Act. Here again, the court observed that this point had not been raised before the arbitrators and that the only procedural or jurisdictional objection made by the brotherhoods before the arbitrators was that the carrier had no right to institute the procedure to pool the cabooses and that this question was not arbitrable. The Court of Appeals pointed out that this latter issue had been passed on and properly decided by the arbitrators. (Pet. A13)

ARGUMENT

1. The petitioners' basic position here is that the "entire arbitration proceeding" at issue "comes perilously close to compulsory arbitration" (Pet. 18) and that "in a very real sense the Court of Appeals has substituted involuntary arbitration for voluntary arbitration." (Pet. 18) These assertions are sheer hyperbole; petitioners were party to agreements, the National Pooling of Cabooses Agreements, which expressly provided the procedures to be followed "whenever the carrier desires so to pool its cabooses"; those Agreements provided that in the event of a dispute which could not be settled by the parties by their own efforts, or after the efforts of the National Mediation Board, "the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the arbitration board shall be final and binding upon both parties." (Pet. 11)

The arbitration procedure here was not a compulsory arbitration to which the brotherhoods had not agreed, but the very procedure that the brotherhoods and the carriers

had agreed upon as the means of settling disputes as to the pooling of cabooses. Indeed, it was at the insistence of the brotherhoods that Clinchfield in the first instance submitted the question of its pooling of cabooses to the procedures contemplated by the National Pooling of Cabooses Agreements to which it and the petitioners were parties. In the light of this background, the broad assertion of petitioners that they were forced into a compulsory arbitration not provided for by the Act is absurd.[1]

2. The position of the petitioners, more narrowly stated, is that they could not be required to proceed to arbitrate pursuant to the arbitration clauses of the National Pooling of Cabooses Agreements which they had signed until such time as they chose to sign a further document containing recitals as to the various procedures contemplated by Sec-

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[1] Although this case hardly involves compulsory arbitration, perhaps a word is appropriate with respect to petitioners' apparent suggestion that compulsory arbitration is not contemplated by the Railway Labor Act. Nothing could be further from the truth. The Act, of course, contains a compulsory arbitration procedure, administered by the National Railroad Adjustment Board, for the compulsory arbitration of grievances or so-called "minor disputes." See § 3, 45 U.S.C. § 153; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723-28 (1945). Indeed, this Court has in terms characterized the § 3 procedure as "compulsory arbitration." *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30, 39 (1957).

One of the petitioners took the position that if the dispute was not arbitrable under the Agreement, the only recourse of Clinchfield was to follow the procedures of the Railway Labor Act for the making of changes in collective bargaining agreements, the so-called "major disputes" provisions, which do not provide for compulsory arbitration. See Arb. Tr. 37; Pet. A15; and § 6 of the Act; see also *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284 (1963). The Petition for Certiorari renews this suggestion. Pet. 18-19. But, clearly, if there had been no agreement to arbitrate here, the Adjustment Board procedures contemplated by § 3 would have been applicable; the case is clearly one of the construction or interpretation of the National Pooling of Cabooses Agreements, not an effort on the part of Clinchfield to change those Agreements.

tion 8 of the Act. (Pet. 19) Why it should be incumbent that the parties execute a second agreement to arbitrate when they had already executed one is not suggested by petitioners. The only predictable consequence of such a procedure would be delay, perhaps without end. Petitioners carefully refrain from stating what the consequences would be if they refuse to join with Clinchfield in executing the second arbitration agreement after the mediation procedures had been exhausted. Doubtless that position would be that until and unless petitioners executed a new arbitration agreement, the arbitration could not go forward and Clinchfield would have no right to pool cabooses.[2] Such a construction of the arbitration provisions of the Railway Labor Act is hardly consistent with the general purpose of the Act, specified in Section 2, "to provide for the prompt and orderly settlement of all disputes."

Petitioners' position is that the agreement to arbitrate had to contain recitals on all the procedural matters specified in subsections (b) through (n) of Section 8 of the Act, and that any failure to include any of these recitals vitiated the award later rendered. To give one example, it is apparently petitioners' position that the agreement is fatally deficient because it did not provide, in the terms specified

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[2] Indeed, at one point before the arbitrator, the brotherhood representatives asserted that before the arbitrators could proceed the brotherhoods had to join with the carrier representatives in executing a document framing the question to be decided by the arbitrators, and that if the parties were unable to agree on the form or substance of such a document, the arbitration could not proceed. Arb. Tr. 19, 59-60, 98. One is reminded of the situation referred to in the Court's opinion in *Elgin, J. & E. R. Co.* v. *Burley, supra,* 325 U.S., at 725-26, where prior to the 1934 amendments to the Railway Labor Act the parties were able to "defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by that [the 1926] Act."

in Section 8(g) of the Act, that "the signatures of a majority of said board of arbitration affixed to the award shall be competent to constitute a valid and binding award." But the parties expressly agreed that the arbitration would take place "under the Railway Labor Act, as amended." Surely this can be construed in no other way than as a reference to the procedures recited in Section 8 of the Act. Indeed, the specific procedure just quoted was in fact followed, as were all the relevant procedural provisions of Section 8, except to the extent that the failure to follow them was attributable to petitioners. See Appendix A hereto.

The Act specifies as a ground for impeachment of an award that "The award plainly does not conform to the substantive requirements laid down by the Act for such awards, or that the proceedings were not substantially in conformity with this Act." Section 9 *Third* (a). The Act does not specify as a ground for impeachment of the award that the arbitration agreement fails to contain all the recitals mentioned in the Act.[3] The reason is obvious. In enacting Section 8, Congress was not concerned with the terms that the parties specified in the arbitration agreement, other than as a means to an end. That end is the rendition of an award in substantial conformity with the procedural requirements set forth in the Act. If there is substantial conformity with the procedural requirements

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[3] Clearly, at the time of the execution of the National Pooling of Cabooses Agreements, the details specified in § 8 could not be contemplated and provided for in the case of each possible dispute. The petitioners' position that § 8 had to be literally complied with in the arbitration agreement is, accordingly, as unreasonable factually as it is legally. The courts have in the past enforced general arbitration agreements which might cover a variety of disputes under the Railway Labor Act. See *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern R. Co.*, 220 F. Supp. 319 (E.D. Tex. 1963).

set forth in the Act, the failure of the arbitration agreement to recite them is hardly material.

The fact of the matter is that the procedural requirements of Section 8 of the Act, to the extent they touched on the arbitration at bar, were complied with, except in cases (such as the matter of the number of arbitrators, discussed at pp. 15-16, below) where the failure to comply with them is attributable to petitioners. We shall not burden the Court at this point with a detailed discussion of the substantial compliance of the actual proceedings before the arbitrators with the terms of the Act, but in Appendix A, pp. 1a-5a, *infra*, we detail the various procedural requirements of Section 8 and indicate how they were substantially complied with to the extent they were pertinent, except in those cases where the deviations are attributable to petitioners.[4]

The basic position of the petitioners here—that the arbitration agreement must specifically recite each of the various matters set forth in Section 8 of the Act as a condition upon the validity of the award—exalts form over substance in a fashion that is rarely suggested in a judicial, let alone an arbitral, proceeding.[5] In response to this posi-

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[4] Should it be held that an agreement to arbitrate under the Railway Labor Act must literally contain all the recitals enumerated in § 8 of the Act, there is an alternative ground for upholding the award here, which alternative ground we urged in the courts below—namely, that the agreement to arbitrate, and the award rendered thereunder, are valid at common law, apart from the Railway Labor Act. There is no reason to believe that the Railway Labor Act is intended to make arbitration more difficult than it would be at common law.

[5] For the flexibility and informality of arbitration, see *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 556-58 (1964); *American Almond Products Co.* v. *Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944); *Lodge No. 12*

tion, it is appropriate to quote the proviso to Section 8 *Third* of the Act: "An award contested as herein provided shall be construed liberally by the Court, with a view to favoring its validity, and . . . no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance."

3. The only specific contentions as to the procedural requirements of Section 8 of the Act which petitioners have dwelled upon in this case relate (i) to the provisions of subsection 8(e) of the Act respecting the definition of the questions to be determined by the arbitrators, which is stressed in this Court (Pet. 19-21), and (ii) to the provisions of subsection 8(c) of the Act as to the number of arbitrators, which was emphasized in the courts below. (Pet. A6, A12-A13) Neither of these contentions warrants further review.

(i) As to the definition of the questions to be determined by the arbitrators, the Agreements provided in broad terms for the procedure to be followed "whenever the carrier desires so to pool its cabooses"; the end of the line of this procedure is that "If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended." The points of dispute between the parties here were (1) whether the carrier had the right to pool cabooses, and (2) if so, what accommodations would be "substantially equivalent to those formerly available on the cabooses" and what arrangements would be appropriate "for supplying and servicing such pooled cabooses." There is no question but

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v. *Cameron Iron Works, Inc.*, 292 F.2d 112, 118-19 (5th Cir. 1961), *cert. denied*, 368 U.S. 926 (1961); *Griffith Co.* v. *San Diego College*, 45 Cal. 2d 501, 289 P.2d 476 (1955).

that these were the matters in dispute between the parties (see Arb. Tr. 71-72, 133),[6] and it was with these issues that the arbitrators proceeded to deal, in an orderly fashion, one after the other. The petitioners suggested that the first question was not arbitrable. The arbitration board decided that the first question was in fact arbitrable, and under the Agreements this decision, even if subject to judicial review, is clearly correct. *Cf. United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).[7]

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[6] Even though issue number (1) was belatedly raised by the brotherhoods (see p. 5, *supra*) and appears frivolous on its face. For this reason, the carrier representatives on the board at one point suggested that the issue was too clear for the arbitrators to deal with. See Arb. Tr. 174.

[7] It was the contention of the brotherhood representatives that the question as to the right of the carrier to pool cabooses was not determinable at all by the arbitrators but by a body known as the Disputes Committee under the National Agreements. See Appendix B, pp. 8a-9a, *infra;* Pet. A15-A16, A18; Arb. Tr. 165-66. The Disputes Committee under the 1951 and 1952 National Agreements had apparently not met for years at the time of the arbitration hearing. Arb. Tr. 54. The petitioners do not print in their petition the article of the Agreements, Article 14, which is alleged to govern. To demonstrate the complete irrelevance of the Disputes Committee procedure, we do so and reproduce the article in question as Appendix C, p. 10a, *infra.*

At this point, it is worth remembering (see n. 2, p. 3, *supra*) that the National Agreements do not deal exclusively with the subject of pooling of cabooses but deal with a variety of matters, in the treatment of certain of which no specific arbitration procedure is provided. Indeed, the bulk of the Agreements are devoted to the subjects of "Wage Increases" (Article 1), "Cost-of-Living Adjustment" (Article 2), and "Five-Day Work Week" (Article 3). These provisions, particularly the last-named, are enormously detailed, but no arbitration provision relates to them. Additional matters dealt with in the National Agreements are such subjects as "Initial Terminal Delay" (Articles 4 and 5), "Coupling and Uncoupling Air, Signal and Steam Hose" (Article 8), and "Reporting for Duty" (Article 11).

Presumably in connection with these other matters, disputes might have been contemplated to arise "in connection with the revision of individual agreements so as to make them conform to this agreement" (see Appendix C, p. 10a, *infra*); it must be remembered that the National Agreements were negotiated on an

(ii) The argument was stressed by petitioners in the courts below that there was impropriety in the constitution of the board, in that it consisted of five persons whereas the Act specifies that the board will consist of three, or, if the parties so stipulate, of six persons. Section 7 *First*. But petitioners can hardly complain of the composition of the board. It is plain from a reading of Section 7 *First* together with Section 7 *Second* that the basic difference between a board of three and a board of six is that a board of six members has two neutrals and the standard board of three only one. The nonneutral members are evenly divided between the parties in either case. Here, since the parties had not agreed on a board of six, the carrier instituted procedures for a board of three by naming a single carrier representative. Each of the two brotherhoods insisted on naming its own representative. Since the partisan representatives have one vote each,[8] the carrier countered by naming a second representative, to preserve the neutral's status under the Act as a tie-breaker. However, the parties had never agreed that there be named two neutral arbitrators, as would have been appropriate had the parties originally stipulated to a board of six arbitrators, and, accordingly, the Mediation Board named a single neutral arbitrator. The brotherhoods never registered any complaint that a second neutral arbitrator should have been named until after the award was made and the

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industry-wide basis, and dealt with wages, hours and a number of other subjects as to which there were local practices and agreements on the individual carriers. It is this problem with which the procedure set forth in Article 14 is concerned.

[8] The Act expressly contemplates that the arbitrators named by the parties will be partisan. See § 7 *Second* (d). See generally Gold and Furth, Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 Harv. L. Rev. 293, 296-302, 323-25 (1954).

case was in court. Under these circumstances, the authorities teach that any irregularity is waived. *Firemen's Fund Ins. Co.* v. *Flint Hosiery Mills, Inc.*, 74 F.2d 533, 535 (4th Cir. 1935), *cert. denied*, 295 U.S. 748 (1935); *Chicago, R.I. & P.R. Co.* v. *Union P.R. Co.*, 254 Fed. 235, 238 (8th Cir. 1918); *Judson* v. *United States*, 120 Fed. 637, 644 (2d Cir. 1903); *Merritt-Chapman & Scott Corp.* v. *Pennsylvania Turnpike Comm'n*, 261 F. Supp. 1 (M.D. Pa. 1966), *aff'd*, 387 F.2d 768 (3d Cir. 1967); *Petrol Corp.* v. *Groupement d'Achat des Carburants*, 84 F. Supp. 446, 448 (S.D. N.Y. 1949). See *American Almond Products Co.* v. *Consolidated Pecan Sales Co., supra*, 144 F.2d, at 450-451.

4. Finally, the Court of Appeals properly held that the brotherhoods had waived their objections to the form of the agreement to arbitrate,[9] as well as to the number of arbitrators. The only objection made by the brotherhoods before the arbitration board from a procedural standpoint was that the question as to the right of the carrier to pool cabooses was not arbitrable, and that, accordingly, the board could not proceed, at least in the absence of an agreement between the parties as to the questions to be arbitrated. It was perfectly obvious to everybody who could count to ten that the arbitrators were five in number—not three or six, as contemplated by the Act—and it was equally clear that the agreement to arbitrate contained a general reference to the provisions of the Railway Labor Act and did not *in ipsis verbis* contain certain of the various recitals enumerated in Section 8 of the Act. Yet the brotherhoods raised neither of these points before the

[9] As to most of the matters of the form of the agreement to arbitrate, the waiver point is simply alternative to the fact that the proceedings before the board substantially complied with Section 8 of the Act. See point 2 above, pp. 9-13, and Appendix A, pp. 1a-5a, below.

arbitration tribunal. These are precisely the sort of procedural matters which the courts have customarily held a party may waive by failure to object when he has full knowledge of them and proceeds with the arbitration. See *Chicago, R.I. & P.R. Co.* v. *Union P.R. Co., supra,* 254 Fed., at 238; *Livingston* v. *Shreveport-Texas League Baseball Corp.,* 128 F. Supp. 191, 203 (W.D. La. 1955), *aff'd per curiam,* 228 F.2d 623 (5th Cir. 1956); *San Carlo Opera Co.* v. *Conley,* 72 F. Supp. 825, 833 (S.D.N.Y. 1946), *aff'd,* 163 F.2d 310 (2d Cir. 1947); *Ilios Shipping & Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.,* 148 F. Supp. 698, 700 (S.D.N.Y. 1957).

The decision of the Court of Appeals, accordingly, is clearly correct, there is no asserted conflict of circuits, and the questions tendered to this Court do not raise serious recurring issues of substance under the Railway Labor Act but essentially formal matters.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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August, 1969